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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>ARTURO BERNABE BENITEZ,<br>Defendant and Appellant. | G039960<br>(Super. Ct. No. 06CF3333)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed.

Marylou Hillberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, James D. Dutton and Michael T. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

Arturo Bernabe Benitez was convicted of carjacking (Pen. Code, § 215 subd. (a)),[1] evading police (Veh. Code, § 2800.2), assault on a peace officer (§ 245, subd. (c)), and receiving a stolen vehicle with a prior felony conviction for the same offense (§§ 666.5, subd. (a), 496d, subd. (a)). The trial court sentenced him to a total term of seven years in prison. Benitez filed a timely notice of appeal. He asserts the court committed prejudicial error by failing to properly respond to the jury's question regarding the meaning of the word "force" as used in the carjacking instructions. Finding no error, we affirm the judgment.

FACTS

Howard Allen drove his Buick sports utility vehicle to Centennial Park in Santa Ana. His cousin was also in the car. Upon arriving at the park, Allen stopped at the restrooms so his cousin could use the facilities. When his cousin got out of the car, Allen also got out and stood by the car to watch as she walked into the restroom. To maintain a view of his cousin, Allen stepped towards the back door of the car. Although Allen had turned the engine off, he left the keys in the ignition.

As Allen stood waiting for his cousin, a man jumped in Allen's car and drove off. Allen testified he noticed somebody out of the corner of his eye going towards his car and then getting into his car. He attempted to grab the man, but the man slammed the door and "cranked" the car. As the man drove away, Allen ran by the side of the car beating on the window and screaming at him.

On direct examination, the prosecutor offered Allen the transcript of the 911 call he made immediately after the incident to refresh his recollection. Allen then testified he was pretty scared and afraid and was trying to stop the man from taking his car. The man brushed past him, got in the car, slammed the door, and took off. When

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

asked, Allen confirmed he had told the 911 operator the man had pushed him. The tape of the 911 call was played for the jury.

On cross-examination, Allen agreed he did not mention being pushed by the man who took his car until asked by the dispatcher if he had been pushed. On redirect examination, Allen was again asked about the 911 tape and confirmed he told the 911 operator the man had pushed him out of the way before the operator ever used the word pushed. Allen further indicated he was very afraid as the man pushed past him and went for the car.

Santa Ana Police Officer David Prewett testified he responded to Centennial Park in response to a carjacking report and spoke with Allen. Allen told the officer that as he was standing in the doorway of his vehicle an unknown man pushed him out of the way, entered his vehicle, and drove away.

Alfonso Ochoa, a defense investigator, testified that when he interviewed Allen about the details of the Centennial Park incident, Allen stated, "that he was standing towards the rear of his vehicle, that he was not touched by the individual [who took his car, and] that the individual ran straight to the open door and entered the vehicle."

The trial court instructed the jury on the elements of carjacking with Judicial Council of California Criminal Jury Instructions (2007-2008) CALCRIM No. 1650, as follows: "1. The defendant took a motor vehicle that was not his own; [¶] 2. The vehicle was taken from the immediate presence of a person who possessed the vehicle or was its passenger; [¶] 3. The vehicle was taken against that person's will; [¶] 4. The defendant used force or fear to take the vehicle or to prevent that person from resisting; [¶] AND [¶] 5. When the defendant used force or fear to take the vehicle, [he] intended to deprive the other person of possession of the vehicle either temporarily or permanently."

During deliberations, the jury requested the reporter read back "testimony by . . . Allen regarding being 'frozen' or 'in fear' or 'scared' as a result of the theft[,]" and "testimony by . . . Allen in the re-direct regarding the clarification of 'being pushed' by defendant." After the testimony was re-read, the jury requested the court "provide the definition of force in written form as it applies to this case." The court conferred with counsel with Benitez present as to the appropriate response to the jury's question. With agreement by the prosecutor and defense attorney, the court sent the following response to the jury: "Force does not have a legal definition as it pertains to carjacking. Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings. See Jury Instruction 200." The jury convicted Benitez on the carjacking count as well as three others.

DISCUSSION

Benitez contends the trial court erred in its response to the jury's request for a definition of "force." Although Benitez concedes no case has precisely defined the amount of force necessary for a robbery or a carjacking, he argues the court should have instructed the jury the force required was more than that needed to simply take the car. We find no error.

The Attorney General correctly argues Benitez waived the issue because his attorney specifically agreed to the trial court's response to the jury's question. (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1048.) We will address the merits of the issue in this case, though, in the interest of judicial economy to prevent the inevitable ineffectiveness-of-counsel claim. (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156.)

Carjacking is defined in section 215, subdivision (a), as "the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, . . . against his or her will and with the intent to either

permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." Benitez argues the amount of force necessary for a robbery or carjacking is "something more . . . than just that quantum of force which is necessary to accomplish the mere seizing of the property." (*People v. Morales* (1975) 49 Cal.App.3d 134, 139.)

We agree with Benitez there was a conflict in the evidence as to the issue of force. But factual disputes are to be resolved by the jury. It is not for the appellate court to reweigh the evidence and substitute its judgment for that of the jury. That is not the function of the appellate court. (*People v. Barnes* (1986) 42 Cal.3d 284, 303-304.) The only question before this court is whether the trial court erred in failing to further define the term "force" for the jury, and if there was error, was Benitez prejudiced.

Section 1138 imposes a duty on a trial judge "to clear up any instructional confusion expressed by the jury. [Citations.]" (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212.) Citing *People v. Beardslee* (1991) 53 Cal.3d 68, 97 (*Beardslee*), Benitez asserts, "[A] court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury." But as *Beardslee* states: "This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information." (*Ibid.*) For example, in *Gonzalez* the trial judge properly executed his responsibilities under section 1138 to resolve the jury's questions concerning the definition of malice by advising jurors to reread the instructions that had already been given because those instructions were full and complete. (*Gonzalez, supra*, 51 Cal.4th at pp. 1212-1213.)

Here, the instructions given on carjacking were full and complete. The jury was instructed the defendant had to use "force or fear to take the vehicle . . . ." The force element of robbery (and by analogy, carjacking) has no technical legal meaning and is an element presumably understood by jurors. (*People v. Anderson* (1966) 64 Cal.2d 633, 640; *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708.) The trial court adequately responded to the jury's query by telling it the term "force" does not have a legal definition and it must apply the ordinary meaning of the word.

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.